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91-1752

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RUSSELL JAMES WOOD, M.D.,
Petitioner,

vs.

MELVIN J. FREEDMAN, M.D., et al.,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. May the judiciary give absolute immunity to Fifth Amendment Due Process violators when Congress specifically stated in the original and controlling statute 42 U.S.C. Section 1320c-6 that immunity is contingent on due care being exercised?

LIST OF PARTIES

The parties before the Court of Appeals included the petitioner Russell James Wood, MD and the respondents Melvin J. Freedman, MD; Alan J. Stein, MD; Norman Taylor, MD; Chester Hill, MD; Edward DuVivier, MD; Harold J. Kolb, MD; Central Illinois Medical Review Organization; Thomas O'Neill; Crescent Counties Foundation for Medical Care; Thomas R. Hyngstrom, PhD; Marshall T. Hale, MD; Michael Brewer, MD; Michael Pick, MD; George Taylor MD; Walter R. Williams, MD; J.D. Winterhalter, MD; Robert Bruce, MD; Christopher Green, MD and one or more John Does, to be named or discovered.

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Appendix B Supplement:

US District Court of
Southern Illinois

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RUSSELL JAMES WOOD, M.D.,
Petitioner,

vs.

MELVIN J. FREEDMAN, M.D., et al.,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Russell James Wood respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals from the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals (Appendix, a-1) is unpublished, dated October 25, 1991.

JURISDICTION

The judgment of the Court of Appeals was issued on October 25, 1991. The extension of sixty days for filing this writ was

granted on January 17, 1992, extending the time to March 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

Sherman Act Section 1, 15 U.S.C. Section 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

42 U.S.C. Section 1320c-6. Immunity and Liability Section of U.S.C. Section 1320c-et seq. (1982) for Peer Review Organizations:

> (a) Providers of information. Notwithstanding any other provision of law, no person providing information . . . shall . . . be liable . . . *unless* . . . such information is false.
>
> (b) Employees and fiduciaries of organizations having contracts with Secretary. No person who is employed by, or who has a fiduciary relationship with, any such organization or who furnishes professional services to such organization shall be held by reason of the performance by him of any duty, function, or activity required or authorized pursuant to this part or to a valid contract entered into under this part, to have violated any criminal law, or to be civilly liable under any law of the United States or of any State (or political subdivision thereof) *provided he has exercised due care*.

(c) Physicians and providers. No doctor of medicine or osteopathy and no provider (including directors, trustees, employees, or officials thereof) of health care services shall be civilly liable to any person under any law of the United States or of any State (or political subdivision thereof) on account of any action taken by him in compliance with or reliance upon professionally developed norms of care and treatment applied by an organization under contract pursuant to section 1320c-2 of this title operating in the area where such doctor of medicine or osteopathy or provider took such action; *but only if*—

(1) he takes such action in the exercise of his profession as a doctor of medicine or osteopathy or in the exercise of his functions as a provider of health care services; and

(2) he *exercised due care* in all professional conduct taken or directed by him and reasonably related to, and resulting from, the actions taken in compliance with or reliance upon such professionally accepted norms of care and treatment.

(d) Reimbursement . . . of legal proceedings. The Secretary shall make payment to . . . the defense of any suit . . . related to the performance of any duty or function under such contract by such organization, member, or employee.

STATEMENT OF THE CASE

Petitioner brought an action under 42 U.S.C. Section 1320c-6 against two peer review organizations and their physician members contending a peer review action against petitioner's Illinois hospital affecting Medicare patients in a bistate medical practice was predicated on unfounded charges of deficient quality of care as a product of antitrust conspiracy.

The peer reviewers and peer review organizations exceeded their scope of authority with sanction recommendations based on erroneous reports and failure to actually verify reports before using them for a basis to sanction.

The actions of the peer reviewers and peer review organizations were in violation of Section 1 of the Sherman Act and of property rights guaranteed by the Due Process Clause of the Fifth Amendment of the Constitution.

This action was originally filed in Missouri as a result of the petitioner's allegation of intentional infliction of emotional harm and loss of property and reputation resulting from unfounded charges and based upon abrogation of due process rights.

The District Court of Eastern Missouri transferred the action to the State of Illinois where the District Court of Southern Illinois dismissed all counts pursuant to the court's interpretation of the decision of the Eighth Circuit Court of Appeals granting absolute immunity to defendants in the case of *Kwoun v. Southeastern Missouri Peer Standards Organization*, 811 F.2d 401 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 1944 (1988).

Petitioner next perfected an appeal to the United States Court of Appeals for the Seventh Circuit contesting the validity of the Kwoun decision and the application of that case by the trial court granting the defendant-appellees absolute immunity on the basis that all defendant-appellees were federal actors and prosecutors.

This case addresses the issue of peer review immunity. Absolute immunity was found by the Eighth Circuit, followed by the Seventh, without consideration of the specific statutory language designating immunity contingent on due care.

A dissenting Judge in each court recognized the creating and controlling 42 U.S.C. Section 1320c-6 specified the exercise of due care.

The issue at bar is whether the creating statute provides for qualified immunity based on the concept of due care or absolute immunity based upon judicial designation originating at the trial court level.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH OTHER CIRCUITS AND THIS COURT.

Congress specifically placed a limited type of qualified immunity in the original and controlling legislation by stating that immunity is dependent on the exercise of due care.

This statutory requirement was present in the original 42 U.S.C. Section 1320c-6 in 1972 governing *Kwoun, supra,* in the 1982 version governing the case at bar, and is in the 1991 version.

The Sixth Circuit in *Taylor v. Flint Osteopathic Hospital, Inc.*, 765 F.2d 146 (1985) agreed with its district court that only qualified immunity exists.

The Eleventh Circuit in *Dozier v. Professional Foundation for Health Care, Inc.*, 944 F.2d 814 (1991) did not consider anything but qualified immunity.

This Court allowed qualified immunity in *Patrick v. Burget*, 486 U.S. 94 (1988).

This Court accepted qualified immunity in *Summit Health, Ltd. v. Pinhas*, 111 S.Ct. 1842 (1991), a case not available to the Seventh Circuit. Recognition of congressional ability to control peer review immunity was secondary to the main thrust of the case, but specifically mentioned by all Supreme Court Justices. The majority stated on page 1848, "The restraint was accomplished by an alleged misuse of a congressionally regulated review process . . . " and the dissenting Justices on page 1849, "The Court has no doubt concerning the power of Congress to regulate a peer-review process . . . ".

II. QUALIFIED IMMUNITY IS SPECIFIED IN LEGISLATIVE HISTORY, LEGISLATION AND JUDICIAL INTERPRETATION

Congress meant to provide some immunity for the physicians in peer review to entice them to participate as accountable private citizens, not as government employees.

The legislative history, the legislation, and judicial interpretations (except for the Eighth and then the Seventh appellate courts) are all consistent with qualified immunity.

A. LEGISLATIVE HISTORY

The legislative history of 42 U.S.C. Section 1320c-6 extends from 1972, when Congress first thought Medicare expenses were becoming excessive and desired to control them. The same considerations for qualified immunity have continued through the 1982 version into the 1991 version with persistence of qualified immunity.

S. Rep. No. 1230, 92d Cong., 2d Sess. (1972) and S. Rep. No. 494, 97th Cong., 2d Sess. (1982) reveal Congress desired to establish an independent private force which was also accountable.

Senator Bennett was the author of legislation establishing review organizations. In the January 25, 1972 Congressional Record, Vol. 118, he states in the second column on page 1017:

> "The amendment is so structured that practicing physicians *rather than* Government agencies or insurance company personnel will decide whether care was necessary and of proper quality. At the same time, I have built numerous safeguards into the amendment to assure *public accountability and proper and professional monitoring of the review organizations.*"

and in the third column on the same page:

> " . . . practicing physicians . . . in . . . *accountable* fashion . . . "

and in the second column on page 1018 the summary of the amendment states:

> Those persons engaged in review activities would be exempt from liability for actions taken in the *proper performance of these duties.*

(emphasis added)

B. LEGISLATION

Congress provided for immunity only if "due care was exercised" in the 1972 Social Security Act originating Peer Standards Review Organizations (PSROs). This limited immunity was continued in 1982 when Peer Review Organizations were formed to modernize and update the PSROs, and has been continued in the 1991 version.

42 U.S.C. Section 1320c-6 states in pertinent part:

(a) Providers of information are not liable *unless* such information is unrelated or false.

(b) Employees are not civilly liable *provided due care is exercised.*

(c) Doctors are not liable if *due care is exercised.*

(d) The Secretary of HHS will pay legal fees.

The persistent theme is that no one is liable "*provided he has exercised due care*". (emphasis added)

C. JUDICIAL INTERPRETATION

The finding of absolute immunity is an anomaly which stands out among the findings of other courts. Two circuits have found qualified immunity consistent with the legislation:

The Sixth Circuit in *Taylor, supra* found qualified immunity.

The Eleventh Circuit in *Dozier, supra* found qualified immunity.

The Eighth and then the Seventh found absolute immunity, each with a dissenting vote for qualified immunity.

This Court did not allow peer reviewers to have absolute immunity in *Patrick, supra.*

All nine Supreme Court Justices discussed congressional regulation of peer review activity in a positive manner for qualified immunity in *Summit Health, supra.*

D. QUALIFIED IMMUNITY PRESENT IN ALL PEER REVIEW LEGISLATION

Congress has specified qualified immunity in all peer review acts. The Social Security Act of 1972 and its revisions in 1982 and 1991 all retained the statement designating immunity "provided he has exercised due care."

The Health Care Quality Improvement Act of 1986 has similar good faith immunity at 42 U.S.C. Section 1111 2(a).

III. THIS COURT SHOULD DECIDE IF THE STATUTE SHOULD BE INTERPRETED AS WRITTEN

Congress specifically designated immunity for peer reviewers as long as they exercised due care. This needs to be

recognized and the judicial conversion of qualified immunity to absolute immunity needs to be addressed.

The question appears to be whether Congress gave immunity to private citizens where they had none, or gave qualified immunity when they did not need it because they were already protected with absolute immunity.

Then the question becomes whether they should be allowed to have absolute immunity when Congress specifically legislated only qualified immunity.

Judge Heaney states in *Kwoun, supra,* 8ll F.2d at 413:

> "If Congress wishes to extend absolute immunity to those who participate in the peer-review process in prosecutorial or adjudicative functions, it is free to do so. *Until it does, I believe we are bound by the statute as written.*"

The plain language doctrine of *Chevron v. Natural Res. Def. Council,* 467 U.S. 837 (1984) at 842 states that, "if the intent of Congress is clear, that is the end of the matter." Congress made qualified immunity very clear and specific in all three peer review doctrines over a twenty year span. 42 U.S.C. Section 1320c-6 has been retained throughout, consistently stating immunity as long as "due care is exercised."

That means immunity as long as due care is exercised. It also means that if due care is not exercised, there is no immunity.

The statement is essentially the same in each of the three statutes, which strongly suggests that the general overview of Congress is immunity only as long as due care is attained.

The Eight Circuit ruled absolute immunity even though Congress stated liability should exist if no due care. This is not following the language of the statute. This is contrary to other legal interpretations and the meaning of the act, and as *Chevron,*

supra at 843 states "the court . . . must give effect to the . . . expressed intent of Congress."

CONCLUSION

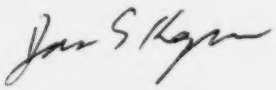
The opinion below is in direct conflict with other circuits and with this Court's recognition of qualified immunity in other cases.

Qualified immunity is consistent with this Court's emerging concepts over the past two decades. It is also consistent with other legislation and is accepted public policy by academic journalists, civil rights groups, and political activists. The statutory interpretation of 42 U.S.C. 1320c-6 affects virtually every health care worker and health care facility in the United States.

This Court should interpret this statute to guide lower courts in the administration of peer review.

For these reasons, the petitioner requests the Court accept review and reverse the decision below.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Dan S. Kerpan, an attorney, certify that I caused copies of the foregoing petition to be served upon the attorneys listed below:

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by causing the same to be deposited with the United States Post Office today, this 23rd day of March, 1992.

Dan S. Kerpan